

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2008 Session at the University of Tennessee College of Law¹

KENNETH EUGENE THOMAS v. MINA SUE THOMAS

**Appeal from the Chancery Court for McMinn County
No. 23,096 Jerri S. Bryant, Chancellor**

No. E2007-00798-COA-R3-CV - FILED APRIL 30, 2008

The issue presented in this case is whether the trial court erred in dismissing a divorce complaint filed by the husband, a Tennessee resident, against his wife, a Washington resident, after a previous ruling by a Washington court granting the parties a legal separation and retaining jurisdiction of the case. Upon review, we conclude that it was within the trial court's discretion whether to exercise its jurisdiction and hear this matter, but that in order to have a factual basis for the exercise of its discretion, the trial court erred in summarily dismissing the case and should have conducted an evidentiary hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and NORMA MCGEE OGLE, SP. J., joined.

Randy G. Rogers, Athens, Tennessee, for the Appellant, Kenneth E. Thomas.

Judith A. Hamilton, Athens, Tennessee, for the Appellee, Mina Sue Thomas.

OPINION

I. Background

In 1987, Kenneth Eugene Thomas ("Husband") and Mina Sue Thomas ("Wife") were married in the state of Washington and lived together there until 1997. In May of 1997, Wife filed a petition for legal separation in Washington, and Husband answered with a counter-petition for dissolution of marriage. While the divorce was pending in June of 1997, Husband moved to Tennessee, and Wife remained in Washington. Following a trial in February of 1998, the Washington trial court granted the parties a legal separation, divided their assets and liabilities, awarded Wife a disproportionate share of Husband's retirement accounts in lieu of spousal support,

¹Oral argument was heard in this case before law students at the University of Tennessee College of Law as a part of the Court's annual Docket Day at the College.

retained jurisdiction to enter further orders as necessary to enforce the award to Wife of Husband's military retirement benefits, found that Wife had a need for continued medical coverage under Husband's military retirement, and specifically barred Husband from converting the decree of separation to a decree of dissolution without first providing comparable alternative health care coverage for Wife, which policy he would be required to maintain for her lifetime.

On June 22, 1998, Husband filed his first complaint for divorce in Tennessee, which was dismissed based on the doctrine of prior suit pending and for lack of jurisdiction. On June 18, 1999, Husband filed his second complaint for divorce in Tennessee, which was dismissed for lack of personal jurisdiction over Wife. On May 18, 2006, Husband filed his third complaint for divorce in Tennessee.² Wife filed a motion to dismiss for lack of jurisdiction, and the trial court declined to exercise jurisdiction based on the prior case pending in Washington and dismissed the case. Husband appeals the dismissal of the third divorce complaint to this Court.

II. Issues

The issue we address in this appeal is whether the trial court erred in dismissing the Husband's divorce petition without an evidentiary hearing. This issue involves questions of law which we review *de novo* with no presumption of correctness afforded to the conclusions of the trial court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

III. Analysis

In dismissing the petition for divorce, the trial court, without hearing any proof, held that "the matter was subject to a prior case pending in Washington State," and declined to exercise jurisdiction. Two or more states may simultaneously have subject matter jurisdiction of a marriage so as to vest each of those states with the authority to rule on the issue of divorce. *Vermillion v. Vermillion*, 892 S.W.2d 829, 832 (Tenn. App. 1994). As we pointed out in *Atchley*, "divorce and custody proceedings being instituted in separate jurisdictions by estranged spouses is quite common." *Atchley v. Atchley*, 585 S.W.2d 614, 617 (Tenn. App. 1978). The rule adopted in *Atchley* provides that in cases where the parties are domiciled in different states, the pendency of an action for a divorce in one state will not require the abatement of an action for a divorce brought in another state, but rather it is discretionary with the trial court. *Id.* The trial court may choose whether or not to proceed where there is an action for divorce pending in another state which has jurisdiction. The action of the trial judge will not be disturbed absent a showing of an abuse of discretion. Thus, this Court must uphold a trial court's ruling "so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). "A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party

² Although not raised as an issue at trial or on appeal, we note that the divorce complaint failed to comply with the pleading requirements of Tenn. Code Ann. §36-4-106, which mandates that certain information be included in a petition for divorce. Nor did the complaint set forth grounds for divorce in substantially the language of Tenn. Code Ann. § 36-4-101 or Tenn. Code Ann. § 36-4-102 as required by Tenn. Code Ann. §36-4-106.

complaining.”” *Id.* When reviewing a trial court’s discretionary decision, “[this Court] . . . begins with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision.” *Overstreet v. Shoney’s Inc.*, 4. S.W.3d 694, 709 (Tenn. Ct. App. 1999) (citing *In re Conservatorship of Scharles*, 285 Cal.Rptr. 325, 329 (Cal. Ct. App.1991); *Citicorp Mortgage, Inc. v. Burgos*, 629 A.2d 410, 412 (Conn.1993); *Onwuteaka v. Gill*, 908 S.W.2d 276, 280 (Tex. Ct. App.1995)). This Court “should permit a trial court’s discretionary decision to stand if reasonable judicial minds can differ concerning its propriety.” *Id.* (citations omitted).

From the record, it appears that the parties were married in the state of Washington and lived together there for ten years. Wife sued Husband for divorce, and while the divorce was pending, in June of 1997, Husband moved to Tennessee, and Wife remained in Washington. Following a trial in February of 1998, the Washington trial court entered an order which made specific findings of fact that Wife was in need of spousal support due to her advanced age, declining health, little or no income, and great need of maintenance. Further, the Washington court found that Husband withdrew and dissipated \$89,000 in stocks/bonds/IRA’s from joint investment accounts at the time of the parties’ separation; that Husband refinanced a second mortgage on the family home and secreted \$20,000 for his personal use in planning for the dissolution; and that Husband failed to pay spousal support in compliance with a temporary support order.

The Washington court granted the parties a legal separation, divided their assets and liabilities, awarded Wife a disproportionate share of Husband’s retirement accounts in lieu of spousal support, retained jurisdiction to enter further orders as necessary to enforce the award to Wife of Husband’s military retirement benefits, found that Wife had a need for continued medical coverage under Husband’s military retirement, and specifically barred Husband from converting the decree of separation to a decree of dissolution without first providing comparable alternative health care coverage for Wife, which policy he would be required to maintain for her lifetime.

Husband then began unsuccessfully suing Wife for divorce in Tennessee beginning in 1998, again in 1999 and finally in 2006. Husband argues that he seeks only a dissolution of the marriage, but it is clear from the Washington court order that in 1998 at the time of that order, Wife had health issues, was in need of health insurance coverage, and that a divorce would affect her insurance coverage. On the basis of these facts, reasonable minds could certainly conclude that Husband seeks to do in Tennessee what he was not allowed to do in Washington – that is to obtain a divorce without providing Wife comparable health insurance coverage as he was ordered to do, and that certainly could be a valid basis on which the Tennessee trial court could base its decision not to exercise its jurisdiction. However, these may not be the facts as they currently exist. The trial court by dismissing this case prior to an evidentiary hearing did not have the necessary information on which to base its decision. Proof on such matters as to the parties’ circumstances since the entry of the order by the Washington trial court would be relevant on this inquiry. Therefore, the trial court on remand should hold an evidentiary hearing and allow the parties to present proof on matters which would be relevant to the trial court in deciding this issue.

Since the manner and method of service of process on Wife was not included in the record, we are unable to make any ruling on the issue of whether the trial court had in personam jurisdiction

over Wife. Therefore, we are not making any ruling on whether the trial court had in personam jurisdiction over Wife based on the method and manner of service of process or whether in personam jurisdiction was necessary to dissolve the marriage. This remains an issue for the trial court on remand.

IV. Conclusion

For the reasons stated herein, we reverse the judgment of the trial court and remand this case for further proceedings. Costs of appeal are assessed to the appellee, Mina Sue Thomas.

SHARON G. LEE, JUDGE